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No. 90-727

In The

Supreme Court of the United States

October Term, 1991

ROBERT G. HOLMES, JR.,

Petitioner,

vs.

SECURITIES INVESTOR PROTECTION CORPORATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

In its opposition brief (the "SIPC Brief"), the Securities Investor Protection Corporation ("SIPC") avoids acknowledging the import of the express language of §1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-68 ("RICO"), that a plaintiff must show "injury to his business or property" caused "by reason of" a "fraud in the sale of securities." It is from the direct application of these concepts that the civil RICO standing requirement of purchaser or seller status is derived.

Instead, SIPC misreads the statute to ignore the key phrases and focuses attention on a host of false issues. SIPC argues that Petitioner Robert G. Holmes, Jr. ("Holmes") departs from the express language of the statute, that Holmes has advanced certain questionable "myths," and that, because of an epidemic of serious business fraud in the United States, SIPC should be given special indulgence to remedy it. These arguments lack merit and do not assist in resolution of the question before this Court. SIPC also inappropriately invites the exercise of legislative discretion by this Court, to allow SIPC to act as a self-styled vigilante prosecutor of business fraud, free of statutory requirements, when neither the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa-78lll ("SIPA"), nor RICO authorize or contemplate such activities. SIPC's invitation to misread §1964(c) and create special RICO standing for SIPC to comport with SIPC's view of its own mission, at the expense of plain statutory language and settled legal precedent, should not be accepted by this Court.

ARGUMENT

I.

SIPC IS NOT A PERSON THAT HAS BEEN "INJURED IN HIS BUSINESS OR PROPERTY."

As a procedural matter, SIPC erroneously claims that Holmes has raised the argument that SIPC is not a person "injured in his business or property" for the first time in the Petitioner's Brief ("Holmes Brief") (SIPC Brief, p. 36). In fact, Holmes raised this argument previously in Holmes' Petition for Certiorari ("Cert. Petition") at page 11, text and footnote 12.[1] Accordingly, the argument is properly included in the Holmes Brief on the merits pursuant to Supreme Court Rule 24(1)(a). Moreover, SIPC did not object in its opposition to the Cert. Petition that the argument concerning injury to business or property was newly raised. Since the language that a person be "injured in his business or property" is contained expressly in the text of RICO §1964(c), the matter can hardly be said to be new.

On the merits, in the opposition brief, SIPC was unable to demonstrate that it was directly injured in its "business or property." Although SIPC claims that it has standing as "a party in interest to all matters" under SIPA (SIPC Brief, p. 37), the standards of RICO §1964(c), not

[1] Additionally, in Holmes' Ninth Circuit Brief below, Holmes cited *Int'l Data Bank Ltd. v. Zepkin*, 812 F.2d 149, 152 (4th Cir. 1987), which discussed "injury" to "business or property" as a requirement of civil RICO standing. (*See* Holmes' Ninth Circuit Brief, p. 67, ns. 193, 194, 199, 200, 201, 202, 203).

those of SIPA, are applicable to determine standing here. SIPC argues that it acquired subrogation rights when it paid money to customers of the failed brokerage firms. (SIPC Brief, p. 37-39). The claims to which SIPC is subrogated, however, were held by customers of the defunct brokerage firms who did not purchase the allegedly manipulated securities and are not cognizable claims against Holmes under securities laws. RICO claims against Holmes, held by customers of the failed brokerage firms who purchased the allegedly manipulated securities, have already been asserted in a companion class action.[2]

To note that SIPC's "injury" consists of "advances made to the Trustees" of the defunct brokerage firms (SIPC Brief, p. 36) does not suffice to establish SIPC as a directly injured victim. (*See* Holmes Brief, pp. 9-16). SIPC does not dispute that only the directly injured party has standing to invoke civil RICO. Here, the direct victims of the alleged racketeering activity were open market purchasers and sellers of the allegedly manipulated securities and the failed security brokerage firms, not SIPC. SIPC arrived on the scene to provide aid and assistance after the damage had already been done. (*See* Holmes Brief, pp. 14-16).

II.

SIPC WAS NOT INJURED "BY REASON OF" THE ALLEGED FRAUD.

Holmes has argued that one who was not a purchaser or seller of securities could not have been injured under

[2] District Court Clerk's Record 475 (*Cain v. Vigman*, No. 83-5674 AWT (Tx) Complaint, pp. 116-118, parag. 246-254).

RICO "by reason of" alleged predicate violations of Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78j(b) ("Exchange Act") and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5 ("Rule 10b-5") thereunder. However, SIPC contends that the argument that civil RICO standing requires that a person who has been injured must have been injured "by reason of" the alleged racketeering activity is not before this Court because certiorari was granted "limited to Question 1 presented by the petition" (SIPC Brief, p. 34), and was not granted with respect to Question 2.

Since the "by reason of" language and requirement is contained on the face of §1964(c), the question on civil RICO standing, as to which this Court granted certiorari, of necessity encompasses an analysis of the phrase.

Question No. 2 in the Cert. Petition, as to which certiorari was not granted, related to whether liability "may be imposed against a defendant, as a co-conspirator, when his own conduct has no causal connection to the harm sustained by the plaintiff." (Cert. Petition, page (i)).[3] The inquiry in Question No. 1, as it relates to the application of the phrase "by reason of," calls for an evaluation of the activities of *all* of the alleged conspirators in the aggregate in relation to the harm sustained by plaintiff as a part of a broader inquiry into the plaintiff's standing under RICO §1964(c).

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[3] The "causal connection" referred to in Question No. 2 relates to the nexus between the conduct of a single individual and the conduct of other individuals, to evaluate whether the individuals should be treated as co-conspirators.

Under RICO, the concept of proximate cause is inexorably interwoven with the concept of standing. "[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. . . . [A]ny recoverable damages occurring by reason of a violation of §1962(c) will flow from the commission of the predicate acts." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). A question involving civil RICO standing necessarily involves inquiry concerning the "by reason of" requirement.

SIPC argues that there is a question of fact as to whether causation exists which is sufficient for SIPC to survive the standing inquiry. (SIPC Brief, pp. 34-35). The District Court found that there may be a question of fact concerning whether SIPC's injuries would not have been caused "but for" the actions of defendants (Cert. Petition, p. 45(a) (Finding 8).[4] The possible existence of "but for"

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[4] To describe the Finding in a manner so favorable to SIPC involves grammatical license and resolution of all doubts in favor of SIPC for purposes of argument. Read literally and standing alone, the Finding says the opposite, that the alleged predicate acts "did not cause the injuries of [SIPC]." It is only if Finding 8 is considered to be included within the introduction to seven previous findings, ("although there is a genuine dispute regarding material facts with respect to the following issues") that Finding 8 in this context would mean the reverse of what it means standing alone. In view of the ruling by the District Court granting summary judgment to Holmes and the other related findings, (Cert. Petition, p. 38a, Finding 6, p. 39a, Finding 23, p. 46a) the position is stronger that Finding 8 should be read standing alone and not included within the questions of fact covered by the introduction to Findings 1-7.

causation, or causation in fact, however, does not end the inquiry into the causation element of RICO standing. To establish RICO standing, there must be both "but for" or factual causation (a broader scope of causation) and legal proximate causation (causation after applying policies of the law to the broad factual causal connection). See *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2nd Cir. 1991); *O'Malley v. O'Neill*, 882 F.2d 1557, 1561 (11th Cir. 1989), *cert. denied*, 496 U.S. ___, 110 L.Ed. 2d 641 (1990); *Ocean Energy II, Inc. v. Alexander & Alexander*, 868 F.2d 740, at 747-748 (5th Cir. 1989); *Zervas v. Faulkner*, 861 F.2d 823, 834 (5th Cir. 1988).

Under securities laws, loss causation, (which is the equivalent of "proximate cause" under RICO when the "racketeering activity" consists of "fraud and the sale of securities") is not established when the plaintiff is neither a purchaser nor seller of securities. There is no basis upon which SIPC can satisfy the proximate cause requirement in the context of the RICO standing inquiry. This conclusion is readily confirmed upon an examination of SIPC's Complaint, which reveals: (1) that SIPC was neither a purchaser nor seller of the allegedly manipulated securities, and (2) the convoluted, speculative and unforeseeable series of conditions which resulted in SIPC incurring the expenses sought to be recovered. (*See* Joint Appendix, pp. 21-29, SIPC Complaint, para. 3-4). Even if there may be questions of fact regarding "but for" causation, application as a matter of policy of the holding in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), that a person who is neither a purchaser nor seller of securities has no standing to sue for fraud in the sale of securities, results in the conclusion that here there is no legal proximate cause.

III.

IT IS HOLMES, NOT SIPC, THAT IS FAITHFUL TO THE EXPRESS LANGUAGE OF RICO.

SIPC claims that if Holmes' view of standing were adopted, in effect, words would have to be added to RICO §1964(c) which are not already expressly there, to provide that a non-purchaser or non-seller does not have standing. (SIPC Brief, p. 19). In fact, it is not necessary to add any words to RICO §1964(c) to reach the conclusion Holmes advocates. One need only apply the existing language including the "injured in his business or property" and "by reason of" provisions. Applying these terms leads to the conclusion that SIPC does not have standing to sue.

Indeed, it is SIPC that seeks to depart from the express statutory language. To reach SIPC's conclusion, that the only prerequisite to standing is that the plaintiff be "any person," one must read out of the statute and ignore the express phrases that a person be "injured in his business or property" and that the injury be "by reason of" the alleged racketeering activity. SIPC would construe §1964(c) by separating the "victim," "injury," "cause," "wrong," and "remedy," implying that it is sufficient to achieve standing for SIPC to demonstrate that it is a "victim," or any "person." (SIPC Brief, pp. 3, 14, 18). SIPC argues as much when it states, "[s]ince the civil claim for relief under RICO is express, additional standing limitations on 'victim' are improper." (SIPC Brief, p. 19). SIPC even states, "RICO's civil remedy section unambiguously confers standing on all entities who are capable of holding a legal or beneficial interest in property." (SIPC Brief, p. 3).

The flaw in this interpretation is that it means that any "person" could acquire civil RICO standing even if the person were not injured in his business or property or even if the injury were not caused "by reason of" the racketeering activity. That is plainly not the statute nor the law. Even SIPC is forced to acknowledge that standing requires something more than merely being "a person," when it states that "the plaintiff only has standing if . . . *he has been injured in his business or property by the conduct constituting the violation.* . . . " (SIPC Brief, p. 19 *citing Sedima*, at 496) (emphasis added); *see also Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2nd Cir. 1990) (" . . . [I]n order to have standing [under §1964(c)] a plaintiff must show: (1) a violation of §1962; (2) injury to business and property; and (3) causation of the injury by the violation.")

IV.

THE LEGISLATIVE HISTORY OF RICO PROFFERED BY SIPC IS NOT INSTRUCTIVE ON THE QUESTION BEFORE THIS COURT.

SIPC examines the legislative history of RICO at length to conclude that "special judicial standing limitations" should not be read into RICO. (SIPC Brief, pp. 26-33). SIPC's argument is not persuasive because Holmes is not asking that any "special" limitation be read into RICO. The application of the purchaser/seller requirement is implicit in the express "injury" and "by reason of" language of RICO, and the statute should be applied in accordance with its plain meaning. Nowhere in the legislative history of RICO cited by SIPC is there

evidence that the question now before this Court was considered by Congress.

No inference can be made for treatment of securities law standing concepts under RICO from the relationship between RICO and the antitrust laws. The relationship between RICO and the antitrust laws is ambiguous at best. SIPC argues that unspecified "complexities" and "judicially created standing limitations" in antitrust standing concepts were decried by those considering RICO (SIPC Brief, pp. 20, 28-30), and RICO was enacted "outside of the anti-trust statutes." (SIPC Brief, p. 20). Nevertheless, RICO §1964(c) was patterned in relevant part verbatim after Section 4 of the Clayton Act, 15 U.S.C. §15.[5]

Further, "fraud in the sale of securities," which has its own historical civil standing requirement, is an act of "racketeering activity." There is no comparable act of "racketeering activity" for a "violation of the antitrust law." SIPC's argument, that since complex standing requirements under antitrust laws were rejected in developing RICO, standing requirements under securities laws should also be disregarded, is not persuasive. Complexities of standing under antitrust law, which may have been eschewed by Congress, such as the "target area

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[5] The Clayton Act, §4, 15 U.S.C. §15, provides, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may sue. RICO at §1964(c) provides "any person injured in his business or property by reason of a violation of Section 1962 of this Chapter" may sue. See also SIPC Brief, p. 16, acknowledging that RICO's civil provisions create a private enforcement mechanism, "[l]ike the antitrust statutes."

approach,"[6] the "factual matrix test,"[7] the "balancing test,[8] and the "zone of interest,"[9] have no bearing in the securities law context and are not relied upon by Holmes. The rejection of complex antitrust standing limitations does not mean that RICO is entirely without its own limitations on standing.

The existence of an alleged post-RICO legislative effort to insert a purchaser/seller limitation by amendment to RICO (SIPC Brief, p. 32) has no bearing on the question before this Court. Post-legislative developments are a "hazardous" basis for divining legislative intent, and "must be weighed with extreme care," even if they "should not be rejected out of hand." *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n. 8 (1980). It appears, for example, that the "major effort" to "insert a purchaser-seller limitation," identified by SIPC as a basis to infer that RICO does not presently contain a purchaser/seller requirement, did not directly address the purchaser/seller question, the considerations noted in *Blue Chip Stamps*, and standing. Instead, the measure referred to, H.R. 2983, generally addressed the availability of treble damages under RICO for specified "types of behavior," already covered by securities laws.[10] No significance for

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[6] *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955)

[7] *Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 506 (3rd Cir. 1976).

[8] *Bravman v. Basset Furniture Indus., Inc.*, 552 F.2d 90, 99 (3rd Cir. 1977).

[9] *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1151 (6th Cir. 1975).

[10] *See generally*, 133 Cong. Rec. H8835-42 (daily ed. Oct. 20, 1987) (Statement of Rep. John Conyers).

Congressional intent regarding standing would follow from the non-adoption of proposed reform measures. As hazardous a basis for divining intent as is adoption, legislative non-passage is an even more hazardous ground on which to construct Congressional meaning.[11]

V.

SIPC IS ENTITLED TO NO SPECIAL STATUS IN EVALUATING ITS STANDING UNDER RICO.

The salutary purposes of the "private attorney general" concept in RICO civil actions adhere to all civil RICO plaintiffs, including SIPC. SIPC, however, is not entitled to more.

SIPC commences this action under the civil remedy section of RICO and cites RICO §1964(c) in its complaint as the provision upon which it relies. (Joint Appendix, p. 56, SIPC Complaint, par. 253.) SIPC's beliefs that its objectives are laudable (SIPC Brief, pp. 4-7, 47-50) does not

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[11] The opposition by Representative Conyers to H.R. 2983, the proposed amendment to RICO, was broadly based. Although Representative Conyers did focus on the purchaser/seller issue, there is no basis to infer from his statement that RICO does not presently contain a purchaser/seller requirement. Moreover, it is not at all clear that those who wished to reform RICO felt that RICO did not contain a purchaser/seller limitation. The Senate Report on S.438, the Senate Bill, which proposed to amend RICO in 1989, observed that "some courts have . . . held under existing law" that only a purchaser or seller of securities may sue civilly under RICO for fraud in the sale of securities. S. Rep. No. 269, 101st Cong., 2d Sess. 20 (1990) (reporting S. 438). S.438 would have drastically curtailed RICO by de-trebling damage awards for most private suits, including many consumer suits, and purchaser/seller standing limitations, although discussed, were not a focal point of contention. *See generally ibid.*

change SIPC from a "private attorney general" into the actual Attorney General, does not change this private civil action into a government-commenced criminal action (which would not be subject to the civil standing requirements of §1964(c)) and does not excuse noncompliance with the requirements for standing under §1964(c) pertaining to all civil RICO litigants. SIPC has not established that the legislative history of RICO, SIPA or any other statute confers upon SIPC an exemption from the standing requirements applicable to all other plaintiffs under §1964(c).

The Resolution Trust Corporation ("RTC") and the Federal Deposit Insurance Corporation ("FDIC"), which have succeeded the now defunct FSLIC, whose status SIPC seeks to emulate (SIPC Brief, pp. 48-49, n. 253), are authorized by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") at §212, 12 U.S.C. §1821(d)(2)(A)(i) to acquire "all rights, titles, powers and privileges of the insured depository institution" to which the RTC or FDIC is a successor in interest. Under FIRREA, the RTC and FDIC have the power to sue on behalf of the institution under their receivership, and it was in that capacity that the federal agencies brought RICO claims in the cases cited by SIPC. SIPC, however, acts under no similar authorization here. SIPC is neither a receiver nor a successor in interest to the defunct brokerage firms and does not have statutory powers parallel to those of the RTC or FDIC. Further, SIPC is suing here to recover advances made to customers of the defunct brokerage firms (*see* Joint Appendix, p. 56-57, SIPC Complaint, Prayer for Relief, A(1) and (2)). The RTC, FDIC

and FSLIC, in the cases cited by SIPC, were seeking different relief, to recover damages sustained by the defunct entities on behalf of the entity.

SIPC's apparent claim of special standing status because it "vindicates public interests" (SIPC Brief, pp. 22, 49) is not pertinent to the issue at hand. SIPC is not "an agency or establishment of the United States Government" (SIPA, 15 U.S.C. §78ccc(a)(1)(A)) and SIPC is not funded by the government from public taxation revenues. SIPC obtains revenue from assessments imposed privately against securities broker-dealers that are members of SIPC. SIPC, 15 U.S.C. §78ddd(C).

The Securities and Exchange Commission ("SEC"), unlike SIPC, is a government agency and would be entitled to institute criminal RICO proceedings free of civil RICO standing requirements. The SEC, notwithstanding participation as an amicus with SIPC at the Ninth Circuit below, is conspicuously absent as an amicus for SIPC on the issue before this Court.[12]

SIPC does not acquire standing here by virtue of its laudable objectives, statutory hybrid status or subrogation. As a "private attorney general," SIPC is entitled to

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[12] Before the Ninth Circuit, the SEC shared SIPC's views on the question of conspiracy, Question 2 in the Cert. Petition, and filed an amicus brief supporting SIPC. The SEC may well not share SIPC's view on Question 1 of the Cert. Petition which is here at issue. The SEC has been an active advocate to reform RICO to conform it specifically to the implied and express remedies available under federal securities laws. *See Hearings on H.R. 1046 Before the Subcommittee on Crime of the House Judiciary Committee*, 101st Cong. 1 Sess., 513-90 (1989) (Statement of SEC General Counsel, Daniel C. Goelzer).

no more than any other civil RICO plaintiff with respect to standing requirements.

VI.

THE MANDATE THAT RICO BE LIBERALLY CONSTRUED DOES NOT RESOLVE THE QUESTION BEFORE THIS COURT.

SIPC emphasizes Congress' directive that RICO be liberally construed to effectuate its remedial purposes. (SIPC Brief, pp. 10, 20). Acknowledging that mandate does not help resolve the question before this Court. Since the words "injured in his business or property" and "by reason of" are contained in the express language of RICO, they too are a subject of the mandate that RICO be construed broadly.

Another view of the mandate of broad construction is that the object of the mandate is to broaden the remedy of the statute. (SIPC Brief, p. 20). Since the "remedy" is not here at issue, but rather another concept (in SIPC's view, the "victim" or "cause" or "injury"), then the mandate to construe RICO broadly does not apply.

VII.

STATUTORY SILENCE, IF ANY, IS NOT A SUFFICIENT REASON FOR AN INTERPRETATION ADVERSE TO HOLMES.

SIPC suggests that RICO is "silent" on the issue before this Court and the Court should not supply extraneous language to fill the silence. (SIPC Brief, p. 20).

The statute is not silent. It expressly contains the phrases "injured in his business or property" and "by

reason of" which are the bases from which a resolution of the standing question should be determined. SIPC, however, argues that because RICO does not expressly incorporate by reference and identify §10(b) of the Exchange Act and Rule 10b-5, RICO does not incorporate the purchaser/seller requirement of standing. (SIPC Brief, pp. 20-22). SIPC claims that RICO incorporates §32(a) of the Exchange Act, 15 U.S.C. §78ff, and that §32(a), unlike §10(b), contains no purchaser/seller standing limitations. (SIPC Brief, p. 22). The principle difficulty with this argument is that it is not borne out by the RICO statute. RICO does not mention §32(a) of the Exchange Act by number, title or description when identifying the predicate act of racketeering activity as "fraud in the sale of securities." Yet in §1961(1), RICO does identify 36 other statutes by direct citation to the number and title of the relevant provision when listing the predicate acts of racketeering activity, which is a strong indication that RICO did not intend to incorporate §32(a).

The introductory phrase "an offense involving" fraud in the sale of securities does not change the result. Section 32 renders criminal any wilful violation of any portion of the Exchange Act. Courts have held that not every violation of the Exchange Act (e.g., a violation of the reporting or proxy rules) constitutes racketeering activity. (*See, e.g., First Pacific Bancorp, Inc. v. Bro*, 847 F.2d 542 (9th Cir. 1988)). Only a violation of securities law which involves fraud in the sale of securities will suffice as an act of racketeering activity. (*See* Holmes Brief, pp. 23-26 and cases cited). The obvious conclusion is that §32, and with it securities fraud violations that do not involve a purchaser or seller, were *not* incorporated as predicate acts of RICO. When SIPC states that Exchange Act §32 (which

involves no purchaser/seller requirement) is incorporated as a RICO predicate offense and not §10(b) (which does involve a purchase/seller requirement), SIPC is engaging in statutory wish fulfillment rather than statutory construction.

SIPC's further arguments that had Congress wanted to impose a standing limitation on RICO, it had only to add appropriate language (SIPC Brief, p. 22) and that Congress was aware of the overlap between RICO and the securities statutes (SIPC Brief, p. 22) are similarly unavailing. A statute is not required to identify expressly and resolve on its face the infinite variety of facts and circumstances to which the statute may apply. *Comm'n on Indep. Colleges & Universities v. N.Y. Temporary State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 502 (N.D.N.Y. 1982); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 402 F. Supp. 251, 254-255 (E.D. Pa. 1975). That is a job for courts, on a case by case basis. The statute may well and properly be silent on a specific application of its general concepts. Such silence does not operate to countervail or read out of existence the general principles and language of the statute.

Equally, there is no reason to infer from statutory silence any intent to overrule *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) or settled precedents of securities law. (*See* Holmes Brief, pp. 28-33).

VIII.

SIPC HAS FAILED TO ESTABLISH THAT HOLMES' POLICY ARGUMENTS ARE WITHOUT MERIT.

Although SIPC entitles its argument *"Holmes'* Policy Arguments Are a Matter for Congress and are Meritless"

(SIPC Brief, p. 39, emphasis added), in the main, SIPC attributes "arguments" to Holmes that were not made by Holmes and instead have apparently been made from time to time by unnamed "proponents of reform" (SIPC Brief, p. 41). These "policy" arguments have been created and rebutted in law review articles and are apparently re-created here.[13] They are of interest but, not having been raised or adopted by Holmes, have little bearing on this Court's decision.[14]

The policy considerations which were identified by Holmes, that of avoiding suspicious claims (*see* Holmes Brief, pp. 34-35) and avoiding an inadvertent and inappropriate overruling of *Blue Chip Stamps* (Holmes Brief, pp. 28-33), are not addressed by SIPC except in so far as

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[13] *See* Blakey & Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform*, 43 Vand. L. Rev. 851 (1990); Blakey, *Foreword: Debunking RICO's Myriad Myths*, 64 St. John's L. Rev. 701 (1990).

[14] SIPC's dismissal of concerns about RICO's broad application, which have been expressed in various academic, judicial, business and legislative circles, is facile and gratuitous. An expansive use of RICO has raised legitimate questions as to whether Congress intended the statute to be used that way. For example, in reporting on one attempt to bring "clarity" and "specificity" to RICO, members of the Senate Committee on the Judiciary stated that "[t]he use of Civil RICO in [a variety of] disputes is not what Congress had in mind when it was debating RICO as a tool to fight organized crime." S. Rep. No. 269, 101st Cong., 2d Sess. 20 (1990) (reporting S. 438).

Moreover, one of the senators who was an original sponsor and legislative promoter of RICO, Senator Roman L. Hruska, has recently indicated that, personally, he believes RICO to have been misused in a manner in which he never intended when he introduced the statute in Congress. *See Oversight on Civil RICO Suits: Hearing before the Sen. Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) at p. 4, 9.

SIPC apparently believes that it is exempt from *Blue Chip's* application which "sadly . . . stands as an unwarranted obstacle to SIPC's ability to . . . preserve and restore its . . . trust fund." (SIPC Brief, p. 49, n. 252). SIPC believes that it "should be allowed . . . to bring wrongdoers to account . . . without regard to *Blue Chip*." (*Id.*). SIPC goes too far when it seeks to exempt itself from provisions of the Exchange Act reflected in settled judicial decisions. The statutory mandate of SIPC is subject to the Exchange Act, which applies to SIPA "as if [SIPA] constituted an amendment to, and was included as a section of, [the Exchange Act]." SIPA, 15 U.S.C. §78bbb.

The "Litigation Floodgate Myth" was not advanced by Holmes, and where Holmes is cited as having adopted it (SIPC Brief, p. 41), Holmes expressed the view that relaxing standing requirements would unduly burden the judicial system when the questions raised by standing can best be resolved at the outset by the Court. Easing standing requirements would result in more harm than good and would itself be an invitation to fraud. (*See* Holmes Brief, p. 36). A compilation of the number of RICO complaints filed, validity of concern about court dockets and other such extraneous evidence, none of which is properly in the record before this Court, will not assist in resolving the question as to which certiorari has been granted.

Other "myths" identified and discussed by SIPC (SIPC Brief, p. 43-48) do not reflect concerns expressed by Holmes except with respect to the possibility of extortionate settlements. Holmes noted that the Court in *Blue Chip* stated that even a complaint, which by objective standards has very little chance of success at trial, has a

disproportionate settlement value so long as the plaintiff can prevent the suit from being dismissed by motion. (Holmes Brief, p. 34). SIPC's sociological response includes speculation about the views of an unidentified "majority of seasoned litigators in the RICO area" (SIPC Brief, p. 44, n. 228) and speculation concerning what unspecified "plaintiffs" file "often" "today" to enhance settlement prospects (SIPC Brief, p. 44). This, too, does little to respond to the concerns expressed by the Court in *Blue Chip Stamps*.

IX.

THE STANDING REQUIREMENTS OF SECTION 1964(c) ALSO APPLY TO MAIL AND WIRE FRAUD.

There is no dispute among the parties that the question of standing, when mail and wire fraud are alleged as predicate acts of "racketeering activity" arising out of fraud in the sale of securities, is within the grant of certiorari. (SIPC Brief, p. 23, n. 91). SIPC argues that the "schemes to defraud" prohibited by the mail and wire fraud statutes are broad and extend to a great variety of transactions (SIPC Brief, pp. 23-24), and neither the wire nor mail fraud statutory prohibitions are limited by a purchaser/seller standing requirement. (SIPC Brief, p. 25). Granting the validity of those observations, they have no bearing on the question before this Court. The requirements of §1964(c), establishing direct injury to business or property of the plaintiff and damage causation, remain as applicable when mail and wire fraud are alleged as the predicate acts of "racketeering activity" as when fraud in the sale of securities is the predicate act. A person who was neither a purchaser nor seller of securities cannot have been directly injured in his business or property by reason of the fraud in the sale of securities

that constituted the mail and wire fraud. (*See* Holmes Brief, pp. 41-44).

CONCLUSION

Even assuming that treble damage suits may be the backbone of private enforcement, that there is much fraud in the world that merits punishment, that "private attorneys' general" play an important role in RICO enforcement, and that SIPC is a worthwhile agency with laudable objectives, this Court should not reach the conclusion that the plain, express standing requirements contained in §1964(c) should be ignored at SIPC's request. SIPC has simply not been injured in its business or property by reason of any fraud in the sale of securities.

Although SIPC has expressed a desire to deal with the larger issues in society and enhance its role as a self-styled prosecutor of perceived wrongs, those matters are not at issue here and do not alter the standing requirements which SIPC must satisfy in order to proceed. Accordingly, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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